



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

September 30, 2009 Government Records Council Meeting

Damon Venable
Complainant

Complaint No. 2008-249

v.

Essex County Prosecutor's Office
Custodian of Record

At the September 30, 2009 public meeting, the Government Records Council ("Council") considered the September 23, 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 failed to specify identifiable government records, the Complainant's request is invalid under OPRA pursuant to 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), James Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Therefore, the Custodian has not unlawfully denied the Complainant access to the records requested.

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 30th Day of September, 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: October 6, 2009

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
September 30, 2009 Council Meeting**

**Damon Venable¹
Complainant**

GRC Complaint No. 2008-249

v.

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

Records Relevant to Complaint: Any and all records, including but not limited to polygraph results, waiver forms, plea bargains, meeting minutes, and names of attendees, relevant to March 2, 1987 plea negotiations held at the Essex County Prosecutor's Office in regards to State v. Damon Venable, indictment number 86-11-4010, Essex County, and verified in a trial transcript dated March 10, 1987.

Request Made: October 20, 2008

Response Made: October 22, 2008

Custodian: Hilary Brunell

GRC Complaint Filed: October 27, 2008³

Background

October 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.

October 22, 2008

Custodian's response to the OPRA request.⁴ The Custodian responds in writing to the Complainant's OPRA request on the second (2nd) business day following receipt of such request. The Custodian states that access to the requested records is denied because the records requested comprise a part of a criminal investigatory file and also constitutes attorney work product.

October 22, 2008

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated October 14, 2008. The Complainant states that the Custodian failed to respond to his OPRA request.

¹ No legal representation listed on record.

² Represented by Essex County Legal Counsel (Essex County, NJ).

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

⁴ The Custodian has stated that she received the Complainant's OPRA request on October 20, 2008. Damon Venable v. Essex County Prosecutor's Office, 2008-249 – Findings and Recommendations of the Executive Director

October 27, 2008⁵

Amended Denial of Access Complaint filed with GRC with the following attachments:

- Complainant's OPRA request dated October 14, 2008;
- Letter from the Custodian to the Complainant dated October 22, 2008.

The Complainant argues that in Shuttleworth v. City of Camden, 258 N.J. Super. 573-85, (App. Div. 1992), cert. den. 133 N.J. 429 (1993), the court opined that: “[w]here a law enforcement investigation has been completed and all judicial proceedings relating thereto have taken place, the interest of the State in the confidentiality of internal records relating thereto is substantially reduced ...” The Complainant argues that because the judicial proceedings concerning the records he requested have been concluded, the records requested cannot legitimately be considered criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-1 et seq.

The Complainant further argues that many, if not all of the records pertaining to the plea negotiation conducted in Essex County Assistant Prosecutor Norman Menz's office in regards to State v. Damon Venable, indictment number 86-11-4010, are not criminal investigatory records. The Complainant argues that information such as the names of the attendees, the plea offered by the prosecutor, and any other relevant records establishing the presence of the defendant at this meeting in the Essex County Prosecutor's Office on said date, is not a part of a criminal investigatory file.

The Complainant argues that OPRA and supporting case law support a finding that the requested records are public records. The Complainant further argues that the requested records were maintained and kept on file by the Custodian. The Complainant argues that his need for the requested records outweighs the Custodian's claim that the record is exempt from disclosure. The Complainant argues that where the inquiry concerns disclosure of confidential investigative records, the Supreme Court has held that the party seeking disclosure must show a “particularized need that outweighs the public's interest in confidentiality of the investigative proceedings.” McClain v. College Hosp., 99 N.J. 346 (1985).

The Complainant further argues that the criminal investigation concerning the case of State v. Damon Venable, indictment number 86-11-4010, was completed and therefore the records requested no longer fall within the criminal investigatory record exemption in N.J.S.A. 47:1A-1.1. The Complainant further argues that his grounds for disclosure of the records requested outweigh the public interest in the confidentiality of the investigative proceedings because the records are crucial to his appeal.

The Complainant also argues that the Custodian's denial of access on the grounds of privilege or work product material is without merit and must be overruled. The

⁵ The original Denial of Access Complaint was not ripe for adjudication because it was filed before the Custodian's statutory seven (7) business day response time expired. However, this defect was cured when the Complainant amended his Complaint after receiving the Custodian's response.

Complainant argues that for the reasons articulated above, the GRC should find that the Custodian violated OPRA and compel disclosure of the requested records.

The Complainant agreed to mediate this complaint.

October 30, 2008

Letter from the Custodian to the GRC. The Custodian states that she received the Complainant's OPRA request on October 20, 2008 and responded on October 22, 2008. The Custodian encloses a copy of the October 22, 2008 response to the Complainant's OPRA request.

December 1, 2008

Offer of Mediation sent to the Custodian.

December 18, 2008

The Custodian does not agree to mediate this complaint.

June 1, 2009

Request for the Statement of Information sent to the Custodian.

June 4, 2008⁶

Custodian's Statement of Information ("SOI") attaching the Complainant's OPRA request dated October 20, 2008. The Custodian certifies that the Complainant's request for waiver forms is unclear. The Custodian further certifies that polygraph results, if such records exist, would be part of the Essex County Prosecutor's investigatory file. The Custodian certifies that the investigatory file, whether open or closed, is not a public record under N.J.S.A. 47:1A-1.1 and Janeczko v. NJ Department of Law and Public Safety, Division of Criminal Justice, GRC Complaint Nos. 2002-79 and 2002-80 (June 2004).

The Custodian certifies that the Complainant's request for meeting minutes or records relating to a plea negotiations meeting held in the Essex County Prosecutor's Office failed to properly identify the records requested. Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006). The Custodian certifies that the Complainant did not provide a meeting date but instead stated that "[t]his meeting is confirmed and acknowledged" in "the March 10, 1987 trial transcript." The Custodian certifies that the Custodian is not required to search her records to determine a meeting date. Reda v. Township of West Milford, GRC Complaint No. 2002-58 (January 2003).

The Custodian certifies that even if such a meeting was held, it would not have been transcribed. The Custodian also certifies that the file, therefore, would not contain any records responsive to the Complainant's request for minutes. The Custodian further certifies that any other records associated with a plea offer, if such records exist, would be a part of the Essex County Prosecutor's investigatory file and, therefore, would not be a government record pursuant to N.J.S.A. 47:1A-1.1.

⁶ Additional correspondence 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.

Lastly, the Custodian certifies that any records relating to a plea recommendation, if such records exist, would fall within the scope of “inter-agency or intra-agency advisory, consultative, or deliberative material” under N.J.S.A. 47:1A-1.1 and therefore, would not be subject to disclosure pursuant to OPRA. Bent v. Township of Stafford Police Department, 381 N.J.Super. 30, 40 (App. Div. 2005), citing MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546-49 (App. Div. 2005).

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 to the Complainant’s OPRA request on the second (2nd) business day following receipt of such request. The Custodian denied access to the requested records, stating that the requested records were part of a criminal investigatory file and constituted attorney work product. The Complainant argued that the requested records cannot legitimately be considered criminal investigatory records exempt from disclosure pursuant to N.J.S.A. 47:1A-1 et seq. because the judicial proceedings of which the requested records were the subject were concluded. Shuttleworth v. City of Camden,

258 N.J. Super. 573-85, (App. Div. 1992), certif. den. 133 N.J. 429 (1993) The Complainant further argued that his reasons for disclosure of the requested records outweighed the public's interest in confidentiality of the investigative proceedings. McClain v. College Hosp., 99 N.J. 346 (1985). Specifically, the Complainant states that he needs the requested records to pursue an appeal of his conviction.

The Custodian later argued in the Statement of Information that any record relating to a plea recommendation constitutes "inter-agency or intra-agency advisory, consultative, or deliberative material" under N.J.S.A. 47:1A-1.1 and is therefore not subject to disclosure pursuant to OPRA. Bent v. Township of Stafford Police Department, 381 N.J.Super. 30, 40 (App. Div. 2005), citing MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546-49 (App. Div. 2005). The Custodian further argued that the Complainant's request for meeting minutes relating to a plea negotiation meeting held in the Essex County Prosecutor's Office failed to properly identify the record sought. The Custodian also argued that the Complainant's request for waiver forms was unclear.

The Complainant's OPRA request is, however, invalid because it fails to specify identifiable government records and would require the Custodian to conduct research to identify records which may be responsive to the request. 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),⁷ 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."⁸

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

⁷ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁸ As stated in Bent, *supra*.

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).”

OPRA does not require custodians to conduct research to satisfy an OPRA request. MAG, supra. OPRA only requires a custodian to search for an identifiable government record. See James Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007). OPRA requires a custodian to make available only identifiable governments records. Bent, supra. It is the requestor’s obligation to identify the records sought with specificity. The request may not be a broad, generic description of documents that requires the custodian to search the agency’s files. See Bart v. Passaic County Public Housing Agency, Docket No. 406 N.J. Super. 445 (App. Div. 2009).

Because the Complainant failed to specify identifiable government records, the Complainant’s request is invalid under OPRA pursuant to 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), James Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), Bart v. Passaic County Public Housing Agency, Docket No. 406 N.J. Super. 445 (App. Div. 2009), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Therefore, the Custodian has not unlawfully denied the Complainant access to the records requested.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant failed to specify identifiable government records, the Complainant’s request is invalid under OPRA pursuant to 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), James Donato v. Township of Union, GRC Complaint No. 2005-182 (January 2007), Bart v. Passaic County Public Housing Agency, 406 N.J. Super. 445 (App. Div. 2009), and Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Therefore, the Custodian has not unlawfully denied the Complainant access to the records requested.

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009