



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

November 4, 2009 Government Records Council Meeting

Steven Brzdek
Complainant

Complaint No. 2008-81

v.

New Jersey State Parole Board
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’s Request Items No. 1 and No. 2 do not specify identifiable government records and would require the Custodian to conduct research to identify records responsive to the Complainant’s requests, the Complainant’s OPRA Request Items Nos. 1 and 2 are invalid pursuant to MAG Entertainment LLC. V. Div. 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).
2. Because the Chief of Information Technology has certified that fulfilling the Complainant’s request for copies of all official state e-mails to and from State Parole Board Executive Director Joseph M. Shields from January 1, 2008 through March 26, 2008 would substantially disrupt the agency’s operations, because the Custodian attempted to reasonably accommodate the request, and because the Complainant failed to respond to the Custodian, the Custodian has not unlawfully denied the Complainant access to Request Item No. 3 pursuant to N.J.S.A. 47:1A-5.i., Vessio v. NJ Department of Community Affairs, GRC Complaint No. 2007-63 (May 2007) and Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-13 (May 2009).
3. Because the Custodian certified that no records responsive to Request Item No. 4 exist and there is no credible evidence in the record to refute the Custodian’s certification, the Custodian has not unlawfully denied access to the requested cell



phone records pursuant to 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 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**

**Steven Brzdek¹
Complainant**

GRC Complaint No. 2008-81

v.

**New Jersey State Parole Board²
Custodian of Records**

Records Relevant to Complaint:³

1. Any and all information, paperwork, documentation, and memos relating to the State Parole Board's ("Board") Residential Assessment Center ("RAC") presentation to the GEAR Sentencing Corrections Task Force on December 12, 2007. Any and all information, paperwork, documentation, and memos relating to changes or updates in this proposed program to date.
2. Any and all information on the current Half Way Back program, including all written plans for future expansion and the number of escapes or walkaways from this program since 2004 to the present.
3. Copies of all official state e-mails to and from State Parole Board Executive Director Joseph M. Shields from January 1, 2008 through March 26, 2008.
4. Copies of State cell phone records from the State cell phone issued to State Parole Board Executive Director Joseph M. Shields from January 1, 2008 through March 26, 2008.

Request Made: March 26, 2008

Response Made: April 4, 2008

Custodian: Dina Rogers⁴

GRC Complaint Filed: April 21, 2008⁵

Background

March 26, 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.

¹ No legal representation listed on record.

² Represented by DAG Ellen Hale, on behalf of the NJ Attorney General.

³ The Complainant requested additional records that are not the subject of this Denial of Access Complaint.

⁴ Thomas Renahan was the Custodian of Records at the time of the OPRA request.

⁵ The GRC received the Denial of Access Complaint on said date.

April 4, 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 pursuant to a conversation on Wednesday, April 2, 2008, this letter is a formal request for an extension of time in which to respond to the Complainant's request. The Custodian states he will provide the records requested by Friday, April 11, 2008.

April 11, 2008

Letter from the Custodian to the Complainant. The Custodian states that Request Item No. 1 for records relating to the Board's presentation on December 12, 2007 is denied. The Custodian states that the records are advisory, consultative, or deliberative material and therefore may not be released pursuant to the Open Public Records Act.

The Custodian states that Request Item No. 2 for any and all information on the current Half Way Back program, including all written plans for future expansion and the number of escapes and walkaways from 2004 to the present, is denied in part and granted in part. The Custodian states that the first (1st) part of Request Item No. 2 for "any and all information on the current Half Way Back program" is denied. The Custodian states that this request is overly broad and does not specifically identify the record sought. The Custodian also states that this request is not a valid OPRA request because it is a request for information. However, the Custodian grants the second (2nd) part of Request Item No. 2 for records regarding the future expansion of the Half Way Back program. The Custodian states that the record, consisting of two (2) pages of the proposed FY 2009 Budget, will be provided to the Complainant upon payment of the applicable copy fees.⁶

The Custodian states that the third (3rd) part of Request Item No. 2 for the number of escapes and walkaways from the Half Way Back program from 2004 to the present is denied. The Custodian states that that the record requested does not exist. The Custodian also states that the information requested is not contained in one specific record or document and compliance with the request would require a substantial and time-consuming effort to search and compile information from multiple records. The Custodian states that OPRA does not require the creation of records.

The Custodian states that Request Item No. 3 for copies of all official state e-mails to and from the Executive Director from January 1, 2008 through March 26, 2008 is denied. The Custodian states that this request is overly broad and does not identify the specific record sought. The Custodian states that such an unspecified search of the Board's electronic records would require a complete shutdown of the Executive Director's e-mail account, which would cause a disruption of the Board's operations. The Custodian states that he will reconsider this denial if the Complainant is able to narrow the request and provide a specific keyword or search criteria.

The Custodian states that Request Item No. 4 for copies of State cell phone records from the State cell phone issued to the Executive Director from January 1, 2008 through March 26, 2008 is denied. The Custodian states that the records sought are not in

⁶ The Custodian provided the Complainant with 44 pages of records in total and charged the enumerated OPRA copying fees.

the possession of the agency. The Custodian also states that the Executive Director has a legitimate expectation of privacy concerning the unqualified disclosure of the records requested.

April 21, 2008

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

- Letter from the Custodian to the Complainant dated April 4, 2008;
- Letter from the Custodian to the Complainant dated April 11, 2008.

The Complainant states that on April 11, 2008, the Custodian unlawfully denied the Complainant access to the records relevant to this complaint.

The Complainant did not agree to mediate this complaint.

May 7, 2008

Request for the Statement of Information sent to the Custodian.

May 14, 2008

Letter from the Custodian’s Counsel to the GRC. The Custodian’s Counsel requests a seven (7) day extension of the deadline for filing the Statement of Information.

May 14, 2008

E-mail from the GRC to the Custodian’s Counsel. The GRC grants the Custodian Counsel’s request for an extension of the filing deadline for the Statement of Information.

May 22, 2008⁷

Custodian’s Statement of Information (“SOI”) with the following attachments:

- Complainant’s OPRA request dated March 26, 2008;
- Letter from the Custodian to the Complainant dated April 4, 2008;
- Letter from the Complainant to the Custodian dated April 11, 2008;
- Letter brief from Custodian’s Counsel;
- Certification of Sean Asay;⁸
- Certification of Christopher Cermele.⁹

The Custodian certifies that on or about March 28, 2008, he contacted Christopher Cermele, Chief of the Information Technology Unit (“IT”) for the Division of Parole Board to ask about the procedure for retrieving copies of all official State e-mails to and from the Executive Director from January 1, 2008 through March 26, 2008. The Custodian certifies that Mr. Cermele provided the Custodian with a detailed explanation of the retrieval process. The Custodian states that after Mr. Cermele reviewed the matter,

⁷ Additional material was submitted by the parties. However, said material is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.

⁸ Supervising Parole Officer for the New Jersey State Parole Board.

⁹ Chief of the Information Technology Unit.

Mr. Cermele concluded that this search would cause a significant disruption in the agency operations as well as to the Executive Director's ability to access his e-mails for a significant amount of time.

The Custodian further certifies that on or about April 1, 2008, he spoke with Captain Sean Asay, Supervisor and Coordinator of Agency Operations for the Division of Parole regarding the third (3rd) part of Request Item No. 2 for the number of escapes or walkaways from the Half Way Back program. The Custodian certifies that Captain Asay confirmed that the records requested were not contained in one specific record or document. The Custodian certifies that Captain Asay confirmed that it would take approximately 100 hours to compile and extrapolate this information to create one document.

The Custodian also certifies that on April 4, 2008, he requested and received an extension of time to respond to the Complainant's OPRA request. The Custodian certifies that he sent a letter to the Complainant on April 11, 2008 addressing each of the Complainant's request items and setting forth the specific reasons for the denial of access to certain records.

The Custodian's Counsel argues that Request Item No. 1 was properly withheld because it was advisory, consultative and deliberative ("ACD") material which is not subject to disclosure pursuant to N.J.S.A. 47:1A-1.1.

"OPRA defines a government record as any paper, written or printed book, document, ... that has been made, maintained or kept on file in the course of his or its official business ... The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." N.J.S.A. 47:1A-1.1.

The Custodian's Counsel argues that in addition to the explicit exception for ACD material, OPRA provides that its provisions:

"shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record." N.J.S.A. 47:1A-9.b.

The Custodian's Counsel further argues that OPRA provides that government records may be exempt from access by Executive Order of the Governor. N.J.S.A. 47:1A-9.a. The Custodian's Counsel argues that pursuant to Executive Order No. 26 (McGreevey 2002), records that contain advisory, consultative or deliberative material or other records protected by a recognized privilege are exempt from disclosure under OPRA.

The Custodian's Counsel argues that the deliberative process privilege is incorporated into N.J.S.A. 47:1A-1.1 by exempting "advisory, consultative or deliberative material" from the definition of a disclosable government record. In Re Liq.

Of Integrity Ins. Co., 165 N.J. 75, 83-85 (2000). The Custodian's Counsel argues that the New Jersey Supreme Court has held that the deliberative process privilege protects the integrity of agency deliberations by permitting the government to withhold records containing advisory opinions and recommendations or reflecting deliberations comprising the process by which government policy is formulated. Atlantic City Convention Center Authority v. South Jersey Pub. Co., Inc., 135 N.J. 53, 62 (1994).

The Custodian's Counsel argues that a federal court explained:

“[The privilege] serves to assure that subordinates within an agency will feel free to provide the decision maker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.” Coastal States Gas Corp. v. Department of Energy, 617 F.2d. 854, 866 (D.C. Cir., 1980).

The Custodian's Counsel argues that for the above listed reasons, the Custodian properly denied the Complainant access to Request Item No. 1.

The Custodian's Counsel states that the Custodian denied the first part of Request Item No. 2 for two reasons: 1) the request was overly broad and failed to specifically identify a record; and 2) the information requested was not contained in a specific record or document and compliance with the request would require a substantial and timely effort to search and compile information from multiple records.

The Custodian's Counsel argues that the Custodian correctly denied the Complainant's request pursuant to MAG Entertainment v. Division of ABC, 375 N.J. Super. 534 (App. Div. 2005). The Custodian's Counsel also argues that agencies are only required to disclose “identifiable” government records. MAG, *supra*.

The Custodian's Counsel argues that the third part of Request Item No. 2 requesting the number of escapes and walkaways from Half Way Back Program from 2004 to the present would have required the Custodian to conduct research to find the information sought in the Complainant's request. The Custodian's Counsel argues that pursuant to MAG Entertainment v. Division of ABC, 375 N.J. Super. 534, a custodian is not required to conduct research or collate information in order to respond to an OPRA request.

“OPRA 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.” MAG, *supra*.

The Custodian's Counsel further argues that the Custodian properly denied the Complainant's request.

The Custodian's Counsel argues that Request Item No. 3 was properly denied as an overly broad request that failed to identify a specific record. Additionally, the Custodian's Counsel argues that Request Item No. 3 was denied because a broad general search of the Board's electronic records would require a complete shutdown of the Executive Director's e-mail account, disrupting the Board's operations.

The Custodian's Counsel argues that the Complainant's Request Item No. 3 was properly denied pursuant to MAG Entertainment v. Division of ABC, 375 N.J. Super. 534. Moreover, the Custodian's Counsel states that the Custodian informed the Complainant that the denial of access to Request Item No. 3 would be reconsidered if the Complainant narrowed his request and provided a specific keyword or search criteria. The Custodian's Counsel states that the Complainant did not narrow his request as requested.

The Custodian's Counsel states that the Custodian denied Request Item No. 4 because the requested cell phone records were not in the possession of the Board. The Custodian's Counsel states that cell phone records are not maintained at the Board. The Custodian's Counsel states that the request was also denied because the Executive Director has a legitimate expectation of privacy concerning the unqualified disclosure of his cell phone records.

The Custodian's Counsel argues that New Jersey case law acknowledges the existence of an executive privilege belonging to the Governor. In Nero v. Hyland, 76 N.J. 213 (1978), the New Jersey Supreme Court rejected a request for disclosure of personal background investigatory materials received by the Governor from the Attorney General concerning a potential candidate for appointment to the State Lottery Commission. The Custodian's Counsel argues that the court determined that the "Governor, as chief executive, must be accorded a qualified power to protect the confidentiality of communications pertaining to the executive function . . . This executive privilege protects and insulates the sensitive decisional and consultative responsibilities of the governor which can only be discharged freely and effectively under a mantle of privacy and security." *Id.* at 225.

The Custodian's Counsel argues that the executive privilege is presumptive and applies when invoked by the executive. United States v. Nixon, 418 U.S. 683 (1974), Nero, supra, 76 N.J. at 708. The Custodian's Counsel argues that the privilege applies to records in their entirety and covers final and post-decisional materials as well as pre-deliberative ones. Re Sealed case, supra, 121 F.3d. 729, 745 (D.C. Cir. 1997).

The Custodian's Counsel argues that in North Jersey Newspapers Company v. Passaic County Board of Chosen Freeholders, 127 N.J. 9, 16-18 (1992), the Supreme Court held that the telephone numbers called by members of the county Board of Chosen Freeholders were not records under the Right To Know Law (OPRA's predecessor). The Custodian's Counsel argues that the court noted that there was not, at that time, a compelling reason on record to reveal the numbers and, thus, the identity of the persons

called; moreover, the court noted a variety of reasons why it was desirable to keep such information confidential, including:

“critical times – when a government official will have to make a telephone call that has an arguable claim to confidentiality – times when, for example, a mayor might need to call a city council member from an opposing political party on a most highly sensitive community issue to enlist that person’s support; or times when a mayor might need to call a community activist to calm troubled waters, without causing disruption that might result from appearing to negotiate with a dissident who may, at the moment, be perceived as a lawbreaker.” *Id.* at 17.

The Custodian’s Counsel argues that the disclosure of the Executive Director’s record of cell phone calls would reveal the identity of persons whom he called for both public and private reasons. The Custodian’s Counsel argues that the holding in North Jersey, *supra*, demonstrates that the concerns underpinning the executive privilege apply to executive branch officials other than the governor. The Custodian’s Counsel argues that the copies of state cell phone records of the Executive Director would also be protected under the executive and ACD privileges.

Certification of Christopher Cermele, Chief of the Information Technology Unit ("IT") for the New Jersey State Parole Board

Mr. Cermele certifies that he is familiar with the facts of the Complainant’s record request for e-mails. Mr. Cermele also certifies that on or about March 28, 2008, the Custodian inquired into the process involved in retrieving copies of all official state e-mails to and from the Executive Director from January 1, 2008 through March 26, 2008. Mr. Cermele further certifies that all Groupwise messages are encrypted. Mr. Cermele certifies that the IT staff cannot read the body of the e-mail without disabling the user’s accounts, changing the password and entering the mailbox of the user. Mr. Cermele additionally certifies that this procedure denies access to the owner of the mailbox until it is released by IT.

Mr. Cermele certifies that to conduct a search of this magnitude with no specific search fields, subject matter or individual, would cause a complete disruption of the Board’s operations for a substantial amount of time. Mr. Cermele also certifies that the Executive Director would be denied access to his e-mail account for an extended period of time. Mr. Cermele further certifies that the actual length of time the procedure would take is dependent upon the number of e-mails involved and the length and volume of any attachments associated with each e-mail. Mr. Cermele certifies that each e-mail and attachment would have to be opened by a member of the IT staff and rendered to hard copy. Mr. Cermele certifies that in the past, with a specific search criterion, the IT staff has spent 10 to 12 hours rendering in excess of 20,000 pages to print.

Mr. Cermele certifies that given the length of time involved, and with no identifying search criteria specified, the overall operation of the agency will be adversely affected by the Executive Director’s inability to read, respond, or generate e-mail while the search is being conducted.

Certification of Captain Sean Asay, Supervisor and Coordinator of Agency Operations for the Division of Parole

Captain Asay certifies that he is familiar with the facts of the records request submitted by the Complainant regarding the Half Way Back program. Captain Asay also certifies that on or about April 1, 2008, the Custodian asked him about the process required to compile and extrapolate the information necessary to comply with the Complainant's request for the number of escapes and walkaways from the Half Way Back program since 2004 to the present.

Captain Asay further certifies that there is no one single record responsive to the request for the number of escapes and walkaways from the Half Way Back program from 2004 to the present. Captain Asay certifies that Half Way Back is a residential program. Captain Asay certifies that "escapee" is a legal term applied to inmates who depart without permission from jails or prisons. Captain Asay additionally certifies that parolees cannot escape. Captain Asay certifies that the data requested regarding walkaways (defined as parole absconders who fail to complete a specified program) is not contained in any single existing record. Captain Asay further certifies that in order to obtain such data, the Board would have to research hundreds of warrant issuance records contained in handwritten log books at operational units spread throughout the State.

Capitan Asay also certifies that in reviewing these records, a parole supervisor would have to determine which warrants were issued as a result of a parolee absconding from supervision and then do an added search to determine whether the parolee absconded from a Half Way Back Program. Captain Asay certifies that such an undertaking would take a minimum of one hundred (100) hours for parole supervisors at the various units to complete.

July 29, 2009

E-mail from the GRC to the Custodian's Counsel. The GRC requests a certification from the Custodian that the Board neither made, maintained, kept on file nor received in the ordinary course of business any items responsive to Request Item No. 4 (cell phone records of Executive Director Joseph M. Shields from January 1, 2008 through March 26, 2008).

July 29, 2009

Facsimile from the Custodian's Counsel to the GRC attaching the certification of Thomas Renahan, former Custodian for the Board.

Mr. Renahan certifies that he was the Custodian for the Board at the time of the Complainant's OPRA request. Mr. Renahan further certifies that on April 7, 2008, he was informed by Diane Angelucci of the Fiscal Unit for the Board that the cell phone records requested by the Complainant were not available. Mr. Renahan also certifies that Ms. Angelucci advised him that the New Jersey Office of Information Technology ("OIT") maintained the requested records and it would require approximately two (2) months to process the information. Mr. Renahan certifies that on April 8, 2008, Ms. Angelucci informed him that the cell phone records were not available and it was

unknown if and when the records could be obtained from OIT because OIT was in the process of updating the New Jersey State telephone billing system. Mr. Renahan additionally certifies that as a result of receiving this information, he advised the Complainant that the requested cell phone bills were not in the possession of the Board or readily accessible to the Board.

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 also provides that:

“[a] request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian....If 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.” N.J.S.A. 47:1A-5.g.

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.

Request Item No. 1 for any and all information, paperwork, documentation and memos relating to the Board's Residential Assessment Center presentation to the GEAR Sentencing Corrections Task Force on December 12, 2007;
Request Item No. 2 for any and all information relating to the Half Way Back program.

The Custodian responded to the Complainant's OPRA request on the seventh (7th) business day requesting an extension of time to respond to the Complainant's request. The Custodian stated that he would provide the records requested by Friday, April 11, 2008. On April 11, 2008, the Custodian denied the Complainant access to Request Item No. 1, stating that the record requested was advisory, consultative, or deliberative material. The Custodian also granted in part and denied in part Request Item No. 2, stating that the request was overly broad and did not specifically identify the record sought. The Custodian provided the Complainant with some records responsive to Request Item No. 2.

However, both Request Item No. 1 and Request Item No. 2 are invalid under OPRA. 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),¹⁰ 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."¹¹

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..."

¹⁰ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹¹ As stated in Bent, *supra*.

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 nos. 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).”

While the Custodian in the instant matter may have identified a record responsive to Request Item No. 2, both Request Item No. 1 and Request Item No. 2 are invalid because the Complainant’s OPRA requests did not specify an identifiable government record but instead sought “information, paperwork and documentation[.]” The Complainant’s OPRA request would require the Custodian to conduct research to identify records responsive to the Complainant’s requests. OPRA requires a custodian to make available identifiable governments records. MAG, *supra*. Pursuant to Bent, *supra*, a requestor must identify the record sought with reasonable clarity and simply requesting all of an agency’s documents does satisfy this requirement.

Because the Complainant’s Request Items No. 1 and No. 2 do not specify identifiable government records and would require the Custodian to conduct research to identify records responsive to the Complainant’s requests, the Complainant’s OPRA Request Items Nos. 1 and 2 are invalid pursuant to MAG Entertainment LLC. V. Div. 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).

Because the Complainant’s Request Item No. 1 is invalid under OPRA, the issue of whether any records that may be responsive to such request are exempt from disclosure as advisory, consultative or deliberative material is moot.

Request Item No. 3 for e-mails to and from State Parole Board Executive Director Joseph M. Shields from January 1, 2008 through March 26, 2008

The Custodian denied the Complainant access to Request Item No. 3, stating that the request was overly broad and that such an unspecified search of the Board’s electronic records would require a complete shutdown of the Executive Director’s e-mail account and cause a substantial disruption to the Board’s operations. The Custodian stated that he would reconsider the denial if the Complainant narrowed his request and provided specific search criteria. The Complainant did not respond to the Custodian.

OPRA permits a custodian to deny access to a government record if the request would substantially disrupt agency operations and if an attempt to reach a reasonable accommodation between the agency and the requestor could not be reached. N.J.S.A. 47:1A-5.g.

In Vessio v. NJ Department of Community Affairs, GRC Complaint No. 2007-63 (May 2007), the complainant requested all fire safety inspection files from 1986 to 2006. The custodian responded to the complainant’s request asking the complainant to narrow

his request. The custodian also certified that fulfilling such a request would substantially disrupt the agency's operations. Based on the custodian's certification that fulfilling the complainant's request as originally structured would result in a substantial disruption to the agency's operations and the custodian's attempt to accommodate the complainant, the GRC held that the custodian's denial of access was authorized by N.J.S.A. 47:1A-5.i.

Also, in Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-13 (May 2009), the complainant requested property files for a list of fifty (50) properties. The custodian responded to the complainant indicating that the complainant's OPRA request encompassed 800-1,000 separate large files and fulfilling the request would substantially disrupt operation of the agency. The custodian also stated that if the complainant did not narrow the OPRA request, the custodian would have to deny it. The GRC held that based on the custodian's attempts to accommodate the complainant and the substantial disruption fulfilling the request would cause, the custodian did not unlawfully deny the complainant access to the records requested. N.J.S.A. 47:1A-5.i.

In the instant matter, Mr. Cermele, Chief of Information Technology Unit, certified that a search of the magnitude required to fulfill the Complainant's request, further complicated by the lack of specific search fields, subject matter or individual, would cause a complete disruption of the Board's operations for a substantial amount of time. Mr. Cermele certified that the Executive Director would be denied access to his e-mail account for an extended period of time. Mr. Cermele also certified that the actual length of time the procedure would take is dependent upon the number of e-mails involved and the length and volume of any attachments associated with each e-mail. Mr. Cermele further certified that each e-mail and attachment would have to be opened by a member of the IT staff and rendered to hard copy. Mr. Cermele certified that even in the past, using specified search criteria, the IT unit has spent 10 to 12 hours and rendered in excess of 20,000 printed pages. Mr. Cermele stated that, given the length of time involved and the lack of identifying search criteria specified, the overall operation of the agency would be adversely affected by the Executive Director's inability to read, respond, or generate e-mail while the search is being conducted. In the April 11, 2008 response to the Complainant's request, the Custodian offered the Complainant the opportunity to narrow his request or provide specific search criteria. However, the Complainant failed to respond.

Because the Chief of Information Technology has certified that fulfilling the Complainant's request for copies of all official state e-mails to and from State Parole Board Executive Director Joseph M. Shields from January 1, 2008 through March 26, 2008 would substantially disrupt the agency's operations and because the Custodian attempted to reasonably accommodate the request, and because the Complainant failed to respond to the Custodian, the Custodian has not unlawfully denied the Complainant access to the Request Item No. 3 pursuant to N.J.S.A. 47:1A-5.i, Vessio v. NJ Department of Community Affairs, GRC Complaint No. 2007-63 (May 2007) and Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-13 (May 2009).

Request Item No. 4 for cell phone records for Executive Director Joseph M. Shields from January 1, 2008 through March 26, 2008

On April 11, 2008 the Custodian indicated to the Complainant that the agency did not possess any records responsive to the Complainant's OPRA request. Mr. Renahan, the Custodian at the time of the Complainant's OPRA request, has certified that the Board did not possess any records responsive to Request Item No. 4. The Complainant has submitted no evidence to refute this certification.

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.

Because the Custodian certified that no records responsive to Request Item No. 4 exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested cell phone records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Because no records responsive to Request Item No. 4 exist, further inquiry into the Custodian's executive privilege argument is moot.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Complainant's Request Items No. 1 and No. 2 do not specify identifiable government records and would require the Custodian to conduct research to identify records responsive to the Complainant's requests, the Complainant's OPRA Request Items Nos. 1 and 2 are invalid pursuant to MAG Entertainment LLC. V. Div. 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).
2. Because the Chief of Information Technology has certified that fulfilling the Complainant's request for copies of all official state e-mails to and from State Parole Board Executive Director Joseph M. Shields from January 1, 2008 through March 26, 2008 would substantially disrupt the agency's operations, because the Custodian attempted to reasonably accommodate the request, and because the Complainant failed to respond to the Custodian, the Custodian has not unlawfully denied the Complainant access to Request Item No. 3 pursuant to N.J.S.A. 47:1A-5.i., Vessio v. NJ Department of Community Affairs, GRC Complaint No. 2007-

63 (May 2007) and Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2008-13 (May 2009).

3. Because the Custodian certified that no records responsive to Request Item No. 4 exist and there is no credible evidence in the record to refute the Custodian's certification, the Custodian has not unlawfully denied access to the requested cell phone records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: Sherin Keys, Esq.
Case Manager

Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 2009