



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

September 30, 2009 Government Records Council Meeting

Ali S. Morgano
Complainant

Complaint No. 2008-92

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:

1. Because the Custodian certified that within the statutorily mandated response time she disclosed copies of the records responsive to Item #3 and Item #4 of the Complainant's request, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has not denied access to said records.
2. Because Item #2 of the Complainant's request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific identifiable government record, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in 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) and the Council's decisions in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) and Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006).
3. Because the Custodian certifies that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are



no records responsive for Item #1, #5, #6 and #7 of the Complainant's request, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and 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 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**

**Ali S. Morgano¹
Complainant**

GRC Complaint No. 2008-92

v.

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

Records Relevant to Complaint:³

- 1) "Cheryl Johnson AKA Cheryl Harris Essex County Prosecutor's correspondence, letter's documents on disposition recommendations, and all prosecutor's documents notes pertaining to disposition recommendations."
- 2) "Cheryl Johnson AKA Cheryl Harris Essex County Prosecutor's disposition recommendations plea agreement documents and all prosecutor's documents pertaining to disposition recommendations plea agreement notes."
- 3) "Cheryl Johnson AKA Cheryl Harris Essex County Prosecutor's June 7, 1988 arrest **bail** arraignment hearing appearance **dates** documents and the name of the presiding **Judge** who conducted the bail arraignment proceedings."
- 4) "Cheryl Johnson AKA Cheryl Harris Essex County Prosecutor's July 24, 1988 arrest **bail** arraignment hearing appearance **dates** documents and the name of the presiding **Judge** whom conducted the bail arraignment proceedings."
- 5) "Essex County Prosecutor's file records on all Polygraph Examination Companies names whom been employed in the year of 1988 and 1989."
- 6) "Cheryl Johnson AKA Cheryl Harris Essex County Prosecutor's files records on her East Callwell Jail Annexes facility psychological evaluation report documents."
- 7) "Cheryl Johnson AKA Cheryl Harris Essex County Prosecutor's files records on her East Callwell Jail Annexes facility psychiatric medical condition report known as short attention span disorder deficit."

Request Made: March 21, 2008

Response Made: March 27, 2008

Custodian: Executive Assistant Prosecutor Hilary L. Brunell

GRC Complaint Filed: April 21, 2008⁴

¹ No legal representation listed on record.

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

³ The Complainant's OPRA request is quoted here as written by the Complainant because the Complainant has used terminology describing records and locations that are not familiar to the GRC.

⁴ The Denial of Access Complaint was dated "April 2008" and the complaint was not date stamped by the GRC; however, this is the date of the Complainant's cover letter forwarding the complaint to the GRC.

Background

March 21, 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.

March 27, 2008

Custodian's response to the OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the fourth (4th) business day following receipt of such request. The Custodian states that she denied the requested records at Item #1 and Item #2 because they are overly broad requests which also seek prosecutorial recommendations that are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1. The Custodian states that she disclosed the records determined to be responsive to the Complainant's request for Item #3 and Item #4, and the Custodian states that she did not find any records responsive to the Complainant's request for Item #5. The Custodian also states that Item #6 and Item #7 of the Complainant's request are denied because they are overly broad requests, seek health care information exempt from disclosure pursuant to 42 U.S.C.A. 1320d-6 and seek records which the Custodian has a responsibility and obligation to safeguard in order to protect a citizen's reasonable privacy interests pursuant to N.J.S.A. 47:1A-1.

April 21, 2008

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

- Complainant's OPRA request dated March 21, 2008
- The Custodian's response to the Complainant's OPRA request dated March 27, 2008

The Complainant states that he has been unlawfully denied access to the records requested. The Complainant states that the Custodian violated N.J.S.A. 47:1A-1 through N.J.S.A. 47:1A-13.⁵

September 16, 2008

Letter from the Complainant to the GRC. The Complainant requests that the GRC obtain from the Custodian a certification index table and forward a copy of it to him.

November 2, 2008

Letter from the Complainant to the GRC. The Complainant declines to participate in mediation.

November 10, 2008

Request for the Statement of Information ("SOI") sent to the Custodian.

⁵ The Complainant fails to assert the manner in which the Custodian violated these sections of OPRA.
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November 17, 2008

Custodian's SOI attaching the Custodian's response to the OPRA request dated March 27, 2008. The Custodian certifies that her search for the requested records involved personally retrieving the records from the file. The Custodian also certifies that the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management is not applicable to the records requested in this complaint.

The Custodian certifies that she received the Complainant's OPRA request on March 21, 2008 and that she responded to the request on March 27, 2008. The Custodian attaches a copy of her response, on which the Custodian reproduced each of the Complainant's requested items followed by the Custodian's response to each item.

The Custodian certifies that the records responsive to Item #3 and Item #4 of the Complainant's request are Complaint CDRs (commonly known as arrest warrants). The Custodian further certifies that she disclosed copies of these records to the Complainant.

The Custodian certifies that Item #2 of the Complainant's request is denied because the request is a blanket request for records. The Custodian cites the Council's decision in Asarnow v. Department of Labor, GRC Complaint No. 2006-24 (May 2006) as authority for said denial.⁶ The Custodian further certifies that there are no records responsive to the Complainant's request for Item #1, #5, #6 and #7.⁷

December 5, 2008

Letter from the Complainant to the GRC. The Complainant confirms that he has received the Custodian's SOI. The Complainant requests a copy of the Custodian's index table certification.

March 25, 2009

Letter from the GRC to the Complainant. The GRC acknowledges receipt of the Complainant's December 5, 2008 correspondence to the GRC. The GRC informs the Complainant that it is not clear what the Complainant is seeking because the Custodian included a document index table as part of the SOI, on which the Custodian copied the Complainant. The GRC further informs the Complainant that if said table is missing from the SOI that the Complainant received, the Complainant should so advise the GRC and the GRC will send a copy of the table to him.

March 30, 2009

Letter from the Complainant to the GRC. The Complainant states that he is submitting additional arguments in support of his Denial of Access Complaint.

⁶ The Custodian further certifies that if the records do exist they would be exempt from disclosure as criminal investigatory material pursuant to N.J.S.A. 47:1A-1. (sic), or in the alternative, would be exempt as ACD material because the records would include opinion or work product.

⁷ The Custodian notes that if there were records responsive to Item #6 and Item #7, the records would be exempt from disclosure under the Health Insurance Portability and Accountability Act codified as 42 U.S.C.A. 1320d-6.

June 9, 2009⁸

Letter from the GRC to the Complainant. The GRC informs the Complainant that *N.J.A.C. 5:105 et seq.* provides for one (1) submission to the GRC from the Complainant and one (1) submission to the GRC from the Custodian; therefore, his additional arguments will not be considered by the GRC unless they are in reply to new issues or arguments that were raised by the Custodian.⁹

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-1.1.

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.

Item #3 of Records Request – “Cheryl Johnson AKA Cheryl Harris Essex County Prosecutor’s June 7, 1988 arrest **bail** arraignment hearing appearance **dates** documents and the name of the presiding **Judge** who conducted the bail arraignment proceedings.”

Item #4 of Records Request – “Cheryl Johnson AKA Cheryl Harris Essex County Prosecutor’s July 24, 1988 arrest **bail** arraignment hearing appearance **dates** documents and the name of the presiding **Judge** whom conducted the bail arraignment proceedings.”

⁸ 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.

⁹ The Custodian did not raise any new issues or arguments.

The Custodian certified that she determined that the records responsive to Item #3 and Item #4 of the Complainant's request are Complaint CDRs, i.e., arrest warrants. The Custodian further certified that by the fourth (4th) business day following receipt of the Complainant's request she disclosed copies of these records to the Complainant. The Complainant failed to provide any evidence to contradict the Custodian's certification.

Accordingly, because the Custodian certified that within the statutorily mandated response time she disclosed copies of the records responsive to Item #3 and Item #4 of the Complainant's request, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has not denied access to said records.

Item #2 of Records Request – “Cheryl Johnson AKA Cheryl Harris Essex County Prosecutor’s disposition recommendations plea agreement documents and all prosecutor’s documents pertaining to disposition recommendations plea agreement notes.”

The Custodian certifies that Item #2 of the Complainant's request is denied because the request is a blanket request for records. The Custodian cites to Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006) as authority for denying access.

With this request, the Complainant is seeking all Essex County Prosecutor's Office disposition recommendations for one Cheryl Johnson or Cheryl Harris. The Complainant has not provided dates for the records or even attempted to bracket by dates the time period during which the records may have been generated. The Complainant also seeks in the same request all plea agreement records and all records pertaining to disposition recommendations [and] all plea agreement notes for the named individual.

In Asarnow, supra, the complainant requested “all delinquent report notices” compiled over a thirteen month period, the GRC found that the custodian properly denied access to records because the complainant's request “does not meet the standard for a proper OPRA request in that the documents the complainant is requesting are not readily identifiable and his request is of the nature of a blanket request for a class of various documents.”

OPRA requests that fail to identify specific government records and requests that require the Custodian to conduct research have been deemed as invalid requests under OPRA. Specifically, 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...”

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).”

Therefore, because Item #2 of the Complainant’s request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific identifiable government record, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in MAG, *supra*, Bent, *supra*, and New Jersey Builders Association, *supra*, and the Council’s decisions in Asarnow, *supra*, and Schuler, *supra*.

Item #1 of Records Request – “Cheryl Johnson AKA Cheryl Harris Essex County Prosecutor’s correspondence, letter’s documents on disposition recommendations, and all prosecutor’s documents notes pertaining to disposition recommendations.”

Item #5 of Records Request – “Essex County Prosecutor’s file records on all Polygraph Examination Companies names whom been employed in the year of 1988 and 1989.”

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

¹¹ As stated in Bent, *supra*.

Item #6 of Records Request – “Cheryl Johnson AKA Cheryl Harris Essex County Prosecutor’s files records on her East Callwell Jail Annexes facility psychological evaluation report documents.”

Item #7 of Records Request – “Cheryl Johnson AKA Cheryl Harris Essex County Prosecutor’s files records on her East Callwell Jail Annexes facility psychiatric medical condition report known as short attention span disorder deficit.”

Pursuant to N.J.S.A. 47:1A-1.1., a government record is only responsive to an OPRA request if it has “been made, maintained or kept on file...or has been received in the course of [the public agency’s] official business ...” The Custodian certifies that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are no records responsive for Item #1, #5, #6 and #7 of the Complainant’s request. The Complainant failed to provide any evidence to contradict the Custodian’s certification.

Because the Custodian certifies that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are no records responsive for Item #1, #5, #6 and #7 of the Complainant’s request, and because the Complainant has failed to provide any evidence to contradict the Custodian’s certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian certified that within the statutorily mandated response time she disclosed copies of the records responsive to Item #3 and Item #4 of the Complainant’s request, and because the Complainant has failed to provide any evidence to contradict the Custodian’s certification, the Custodian has not denied access to said records.
2. Because Item #2 of the Complainant’s request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for a specific identifiable government record, and because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in 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) and the Council’s decisions in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) and Asarnow v. Department of Labor and Workforce Development, GRC Complaint No. 2006-24 (May 2006).

3. Because the Custodian certifies that she responded to the Complainant in writing within the statutorily mandated response time indicating that there are no records responsive for Item #1, #5, #6 and #7 of the Complainant's request, and because the Complainant has failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

September 23, 2009